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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LESLIE A. COSTELLO,

Plaintiff and Appellant,

v.

PETER C. BUCKLEY,

Defendant and Respondent.

D074202

(Super. Ct. No. 37-2014-00043440-
CU-CO-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Eddie C. Sturgeon, Judge. Affirmed.

Pamela E. Havird for Plaintiff and Appellant.

Law Office of Seana B. Thomas and Carol A. Salmacia for Defendant and Respondent.

Following a one-day court trial, the court filed a statement of decision, finding certain facts and ruling in relevant part that the two-year statute of limitations contained in Code of Civil Procedure section 339, subdivision (1), barred the plaintiff's cause of action for breach of an oral contract. Because the plaintiff has not provided us with a

sufficient record of the evidence at trial, she has not met her burden of establishing reversible error on appeal. Thus, we will affirm the judgment in favor of the defendant, Peter C. Buckley (Respondent), and against the plaintiff, Leslie A. Costello (Appellant).

I. FACTUAL AND PROCEDURAL BACKGROUND

From the record presented by Appellant, we know very little. Appellant has provided us with a 22-page appendix, which contains copies of the following 11 documents: nine (of 34) exhibits admitted into evidence at trial, the court's minutes from the day of trial, and a statement of decision (SOD).¹ Appellant has not provided a reporter's transcript, an agreed statement, or a settled statement. Nor has she provided any document (e.g., complaint, trial brief, opening statement, closing argument) that sets forth her claims or the facts on which she based them, although the SOD notes, without more detail, that Appellant's complaint contains causes of action for "Breach of both Written and Oral Contract on Promissory Note," "Fraud," and "Unjust Enrichment." This appeal concerns only the ruling on Appellant's claim for breach of an oral contract.

The trial court's SOD contains the following factual findings: Between October 5, 2010, and November 27, 2011, Appellant "gave" various amounts of money to Respondent; in January 2015, in full satisfaction of a \$50,000 note related to these funds, Respondent paid Appellant a total of \$58,523.84 in two cashier's checks—one in the amount of \$8,480 in interest, and one in the amount of \$50,043.84; and, after payment of

¹ In disregard of the requirements of California Rules of Court, rule 8.124(b), Appellant failed to include as part of her appendix copies of: the notice of appeal; the notice of entry of the judgment (or order) on appeal; the election to proceed by appendix; and the register of actions.

the \$58,523.84 by Respondent, Appellant "claimed" an "oral contract for \$42,000 . . . for the balance of the money she gave to [him]."2

Based on these statements and findings, the SOD contains the following substantive ruling as to the claim for breach of an oral agreement:

"As to the **Oral Contract**, the last time [Appellant] gave money to [Respondent] was on November 27, 2011. Code of Civil Procedure [s]ection 339 applies. 'The statute of limitations upon a contract, obligation or liability not founded upon an instrument of writing is two years.' . . . In this case, [Appellant] *had performed all that was necessary for her to make a claim as of November 27, 2011*. By the very nature of the contract being oral, there is no way to determine any other date of accrual. Any recovery on the oral contract required [Appellant] to file suit no later than November 2013." (Italics added.)

The record on appeal provided by Appellant does not contain a copy of the underlying complaint or otherwise confirm the date on which she filed the action.³ Nonetheless, because the SOD does not otherwise mention the claim for breach of an oral agreement and concludes by awarding judgment to Respondent, we (like the parties in their appellate briefing) have assumed that the court applied the two-year statute of limitations in Code of Civil Procedure section 339, subdivision (1), to bar Appellant's claim.⁴

² This is a finding of fact, and our reference to it is not an appellate determination that the record contains substantial evidence to support the finding. Rather it is an explanation of the court's reasoning.

³ The SOD contains a finding that Appellant filed the underlying action on December 24, 2014.

⁴ For a claim based on "a contract, obligation or liability not founded upon an instrument of writing," the statute of limitations is two years. (Code Civ. Proc., § 339, subd. (1).)

Based on the information Appellant supplied in her Civil Case Information Statement (Cal. Rules of Court, rule 8.100(g)), we are satisfied that Appellant timely appealed from the SOD. Although "[t]he general rule is that a statement or memorandum of decision is not appealable," we exercise our discretion to treat the SOD in this case as an appealable final judgment. (*Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 901; accord, *Hernandez v. Rancho Santiago Community College Dist.* (2018) 22 Cal.App.5th 1187, 1192.)

II. DISCUSSION

On appeal, Appellant challenges the trial court's application of the statute of limitations to bar her claim for breach of an oral agreement. More specifically, Appellant argues that the court erred in determining that her claim accrued as of November 27, 2011—i.e., "the last time [Appellant] gave money to [Respondent]." According to Appellant:

- On November 27, 2011, "[Appellant] issued the . . . check to [Respondent] *which created the oral contract.*" (Italics added.)
- "[Appellant's] issuance of the check on November 27, 2011 was merely *the last act relating to creation of the oral agreement.*" (Italics added.)
- Appellant's claim for breach of the oral agreement accrued on November 27, 2013—the *date on which* "[Respondent] *breached the oral agreement* by failing to repay the monies paid to [Respondent] by [Appellant]." (Italics added.)

- Appellant's claim accrued when "[Respondent] *breached the oral contract on November 27, 2013* with non-payment on the oral contract to [Appellant]." (Italics added.)

Somewhat inconsistently, Appellant also tells us:

- "The facts are that *no time was specified for the repayment of the moneys loaned to [Respondent] under the oral agreement.*"⁵ (Italics added.)

The problem with Appellant's presentation is that, by not providing an adequate record, Appellant cannot establish as a matter of law that the finding of the date of accrual in the SOD is unsupported by substantial evidence. Appellant's reliance on specified evidence or other findings of fact in her attempt to establish a *different* date of accrual is misplaced. To have established that the trier of facts erred in determining the date of accrual of the claim for breach of oral agreement required Appellant to show that the record on appeal—i.e., the complete record—contains no substantial evidence to support the November 2011 finding. That is because, in determining on appeal whether a factual finding is supported by substantial evidence, "we will look only at the evidence and reasonable inferences supporting the successful party, and disregard the contrary showing." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.) An appellant's showing on appeal is insufficient if it presents a state of facts which merely affords an opportunity for a difference of opinion. (*In re Marriage of Rosevear* (1998) 65 Cal.App.4th 673, 682.) "Our authority begins and ends with a determination as to

⁵ Respondent agrees; according to him, "no oral statement was made as to when the \$42,000 under the oral agreement was to be repaid."

whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, *in support of the judgment.*" (*Howard*, at pp. 630-631, second italics added.)⁶

The limited record Appellant has provided does not contain evidence of the terms of the oral agreement—including specifically the amount(s) of any specific loan(s) and the terms of repayment(s), facts necessary to determine a breach and, accordingly, a date of accrual of the claim.⁷ As we explain, by not providing the basic tools necessary to

⁶ Appellant wrongly suggests that we apply a de novo standard of review "because the trial court has erred in the application of the law *to the undisputed facts* set forth in this case." (Italics added.) In support of what Appellant contends are "undisputed facts," she cites to *findings* in the SOD. The evidence that preceded these findings may well have been disputed, but we do not know, because Appellant has not provided a complete record. In any event, the findings on which Appellant relies—namely, "[Respondent] failed to pay the entire \$92,000 to [Appellant] with the payment on the Note dated January 8, 2015"; "[Appellant] claims that there was an oral agreement for the payment of the \$42,000 in this lawsuit for the balance of the monies she gave [Respondent]"; and "as of December 24, 2014, [Respondent] had not repaid the balance of the monies given to him by [Appellant]"—do not establish *either* the terms of the oral agreement *or* the date of the accrual of Appellant's claim for breach of the oral agreement. Nor are those findings inconsistent with the outcome-determinative finding that Appellant's claim for breach of the oral contract accrued "as of November 27, 2011."

⁷ For example, Appellant has provided us with copies of nine trial exhibits—which include six of Appellant's checks payable to Respondent, one cash withdrawal slip from Appellant's account (with no indication what Appellant did with the cash), and a handwritten entry in Appellant's check register with an accompanying check transaction history. However, this is not evidence that any of the funds Appellant apparently gave Respondent were given *with an understanding that he would repay her*—or, more importantly to the issue on appeal, on what terms. Similarly, the SOD contains no findings that Appellant gave Respondent any specific check or amount of cash or that Respondent agreed to repay any specific check or cash advance.

determine whether the trial court committed reversible error, Appellant did not take the first necessary step toward meeting her burden on appeal.

We start with the understanding that "[a] judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) "It is well settled, of course, that a party challenging a judgment has the burden of showing reversible error by an adequate record." (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574.) "A necessary corollary to this rule is that if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed." (*Mountain Lion Coalition v. Fish & Game Com.* (1989) 214 Cal.App.3d 1043, 1051, fn. 9.) As particularly applicable in the present appeal, *Estate of Fain* (1999) 75 Cal.App.4th 973 instructs: "Where no reporter's transcript has been provided and no error is apparent on the face of the existing appellate record, the judgment must be conclusively presumed correct as to all evidentiary matters. To put it another way, *it is presumed that the unreported trial testimony would demonstrate the absence of error*." (*Id.* at p. 992, italics added & deleted.)

Accordingly, given the foregoing legal standards and the trial court's conclusion that Appellant's claim accrued as of November 27, 2011, we must presume that the reporter's transcript (or other evidence not included in the limited record presented by Appellant) contains *evidence* to support the findings that the terms of the oral agreement

included the requirement that Respondent make a payment as of November 27, 2011, and that Respondent did not make the required payment by that date.

In her appellate briefing, Appellant explains that "[t]he 'last fact essential to the cause of action' in this case was the failure of [Respondent] to repay the \$42,000 to [Appellant]." She then suggests that the terms of the oral agreement were such that Respondent was not required to make a payment until November 27, 2013, emphasizing that she "did not know until November 27, 2013 whether [Respondent] would breach the oral contract and refuse as a matter of law to repay the monies to her owed under the oral contract until two (2) years after she issued the last check to [Respondent] on November 27, 2011." While this may have been Appellant's theory of the case at trial, the record on appeal contains *no evidence* to support this theory.⁸

Appellant criticizes the trial court for failing to include, as part of its SOD, a finding "as to when the oral agreement [*sic*] would be repaid." However, before complaining on appeal about an omission or ambiguity in a statement of decision, the aggrieved party must demonstrate that she first objected in the trial court, thereby giving the court an opportunity to correct a potential error or clarify an earlier statement. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1138.) Here, Appellant has forfeited appellate consideration of any potential error associated with the SOD by failing to have included in the record on appeal copies of any requests for a statement of decision or any

⁸ Alternatively, Appellant tells us that "no time was specified for the repayment of the monies loaned to [Respondent] under the oral agreement." Once again, without an accurate record reference for this statement, we are unable to accept Appellant's statement.

objections to a proposed statement of decision (Code Civ. Proc., §§ 632, 634; Cal. Rules of Court, rule 3.1590). (*Ballard v. Uribe, supra*, 41 Cal.3d at p. 574.)

As we explained *ante*, given the standards and presumptions we must apply, the only conclusion we are able to reach on the limited record Appellant presented is that the trial testimony (or the contents of one or more of the 25 trial exhibits not included in the appendix) contains substantial evidence to support the following findings in the SOD: Appellant could have presented her claim against Respondent for breach of an oral agreement "as of November 27, 2011"; and "there is no way to determine any other date of accrual." Accordingly, Appellant did not meet her burden on appeal of establishing that the trial court erred in applying the two-year statute of limitations in Code of Civil Procedure section 339, subdivision (1), to bar Appellant's claim for breach of an oral agreement.

III. DISPOSITION

The March 22, 2018 statement of decision, which we have deemed to be a judgment, is affirmed. Respondent is entitled to his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

IRION, J.

WE CONCUR:

McCONNELL, P. J.

DATO, J.